

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERCY DONELLE CUMMINGS,

Defendant-Appellant.

UNPUBLISHED

November 30, 2006

No. 262294

Genesee Circuit Court

LC No. 04-013530-FC

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316b, first-degree home invasion, MCL 750.110a(2), unarmed robbery, MCL 750.530, and carjacking, MCL 750.529a. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to life imprisonment for felony murder, 14 to 40 years' imprisonment for home invasion, 14 to 30 years' imprisonment for unarmed robbery, and 46 to 70 years' imprisonment for carjacking. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

This case arises from the murder of Nadine Lightsey, which occurred during the weekend of June 14, 2003, in Flint, Michigan. The victim's sister discovered the victim dead in her home. According to the sister, she initially believed that the victim's home had been robbed or that there had been a fight. However, she soon discovered the victim's dead body, wrapped in a blanket, on her bed. Blood was spattered on every wall of the room.

There was physical blood and DNA evidence which placed defendant at the crime. A small bloodstain found on defendant's right shoe was tested for DNA evidence and the test concluded that the victim's blood was present on the shoe. Other physical evidence linking defendant to the crime included shoe impressions found outside the victim's house and inside the home on the kitchen floor that matched the running shoes that defendant was wearing. In addition, a chess set that was stolen from the victim's home was recovered from defendant's house. The police were unable to match any fingerprint evidence at the scene of the crime to defendant however, and they were unable to secure any DNA evidence from the victim's fingerprints that matched defendant. In addition to the aforementioned evidence, defendant made a videotaped statement to the police in which he admitted to fighting with the victim, tying

her up, robbing her, and stealing her car. However, defendant consistently denied that he killed the victim.

Defendant first asserts on appeal that his statements to the police should not have been introduced at trial because the police obtained them in violation of his constitutional rights. Defendant argues that his statements were not voluntary and that waiver of his rights was not knowingly and intelligently made. Defendant also argues that he was deprived of his constitutional rights because the police continued to question him after he invoked his right to an attorney.

The circumstances surrounding defendant's statements to the police are as follows. On June 21, 2003, Trooper Robert Mossing stopped a vehicle driven by defendant. The vehicle belonged to the victim. Defendant was arrested and taken into custody. Detective Sergeant Terry Coon, the officer in charge of the case, interrogated and took statements from defendant in the early morning of June 22, 2003. Sergeant Mitch Brown was in the room for the interviews, which were all videotaped. This first interview was very short because defendant quickly asked to have an attorney present. Detective Coon stopped the interrogation as soon as defendant asserted his right to counsel, and defendant was taken to booking. On the way to the booking department, no detectives or officers interrogated defendant. A short time later a police officer informed Detective Coon that defendant wanted to give a statement. Before Detective Coon resumed questioning defendant, he again advised defendant of his *Miranda*¹ rights, and he had defendant sign written waivers. During this second police interview, defendant told police that he broke into the victim's house after he heard fighting inside between his girlfriend and the victim. He told the officers that he pushed the victim onto her bed and tied her up. He also stated that he and his girlfriend robbed the victim, taking a television and a computer to sell for crack. However, defendant stated that the victim was alive when he left her home, and he consistently denied killing the victim. He asserted that he went back to the victim's home a few hours later, found her dead, and tried to clean up the crime scene.

On appeal, defendant challenges both the voluntariness of his waiver and whether his waiver was knowingly and intelligently made. Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27; 551 NW2d 355 (1996). "When reviewing a trial court's determination of the voluntariness of inculpatory statements, this Court must examine the entire record and make an independent determination, but will not disturb the trial court's factual findings absent clear error." *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). Similarly, this Court reviews de novo the entire record to determine whether an accused has knowingly and intelligently waived his Fifth Amendment rights. *Cheatham*, *supra* at 30. However, deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, *id.*; *Shipley*, *supra* at 373, and the trial court's findings will not be reversed unless they are clearly erroneous and leave "this Court with a definite and firm conviction that a mistake was made." *Shipley*, *supra* at 373. Although this

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Court reviews for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of his rights, the meaning of "knowing and intelligent" is a question of law. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004), quoting *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). We review questions of law de novo. *Id.*

"[T]he Fifth Amendment right to counsel is a corollary to the amendment's stated right against self-incrimination and to due process." *People v Marsack*, 231 Mich App 364, 372-373; 586 NW2d 234 (1998). The right against self-incrimination is guaranteed by both the United States Constitution and the Michigan Constitution. US Const, Am V; Const 1963, art 1, § 17; *Cheatham*, *supra* at 9. Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives that Fifth Amendment right. *Miranda*, *supra* 384 US at 444. Although a defendant may waive his right to counsel, the waiver must be knowing, intelligent and voluntary, and every reasonable presumption is against waiver. *Williams*, *supra* at 641.

Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. While the voluntariness prong is determined solely by examining police conduct, a statement made pursuant to police questioning may be suppressed in the absence of police coercion if the defendant was incapable of knowingly and intelligently waiving his constitutional rights. Whether a suspect has knowingly and intelligently waived his *Miranda* rights depends in each case on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given. [*People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997) (citations omitted).]

The prosecutor must show by a preponderance of the evidence that the defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment right. *Daoud*, *supra* at 634. Furthermore, the *Miranda* analysis must be bifurcated, considering (1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent. *Id.* at 639. Whether a statement was voluntary is determined solely by examining police conduct, but the determination whether it was made knowingly and intelligently depends, in part, on the defendant's intelligence and capacity to understand the warnings given. *Howard*, *supra* at 538. Intoxication from alcohol or other substances can affect the validity of a waiver of Fifth Amendment rights, but is not dispositive. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987).

The right to counsel found in the Fifth Amendment is "designed to counteract the 'inherently compelling pressures' of custodial interrogation" *McNeil v Wisconsin*, 501 US 171, 176; 111 S Ct 2204; 115 L Ed 2d 158 (1991). When an accused specifically requests counsel prior to making a confession, safeguards are necessary to ensure that any subsequent waiver by defendant of his *Miranda* rights is knowing and voluntary. See *People v Paintman*, 412 Mich 518, 525-526; 315 NW2d 418 (1982). Accordingly, in a custodial interrogation, where the accused requests counsel, interrogation must cease when counsel is requested, and police officials may not reinitiate interrogation without counsel present, regardless of whether the accused has consulted with counsel. *Minnick v Mississippi*, 498 US 146, 153; 111 S Ct 486; 112 L Ed 2d 489 (1990). However, the police may engage in further interrogation if the accused himself initiates further communication, exchanges, or conversations with police. *Paintman*,

supra at 525, quoting *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

In the case before us, it is undisputed that defendant invoked his right to have an attorney present during questioning the first time that he was questioned by the police. Following defendant's request, the two detectives who were interrogating defendant ceased their questioning and took defendant to be booked. The record supports that 24 minutes after the initial interview concluded however, defendant initiated further communication by asking to speak with the detectives. Before the lead detective resumed questioning, he read defendant his rights. Following a reading of the *Miranda* rights, defendant signed a *Miranda* rights waiver. After defendant signed the waiver, the detectives once again began questioning defendant about the murder. Following the interview, the detectives again made sure that defendant understood his rights. Defendant clearly stated on a videotape that he willingly made his statements and had not been coerced. Reviewing the totality of the circumstances, we do not find any clear error in the trial court's determination that the waiver was voluntary. The two pieces of undeniable, tangible evidence, the videotape of defendant's statements to the police and the signed waiver, both suggest that defendant was fully apprised of all his rights and, contrary to defendant's claims, that the police did not engage in misconduct to secure the waiver of rights. We therefore reject defendant's claim that his waiver was involuntary.

Defendant also contends that his statements were not knowing and intelligent, due to his mental state at the time they were made. When determining whether a defendant knowingly and intelligently waived his rights, his intelligence and capacity to understand the warnings given must be considered, *Howard, supra* at 537, along with the duration of detention, the manifest attitude of the police toward their prisoner, the physical and mental state of the prisoner, and the diverse pressures which sap or sustain the prisoner's powers of resistance and self-control. *People v Watkins*, 178 Mich App 439, 448; 444 NW2d 201 (1989), rev'd on other grounds 438 Mich 627 (1991). Advanced intoxication, whether the product of drugs or alcohol, may preclude the effective waiver of *Miranda* rights. *People v Davis*, 102 Mich App 403, 410; 301 NW2d 871 (1980).

Defendant testified that he was under the influence of a mixture of crack cocaine, marijuana, and alcohol when he made the statements in question. The facts demonstrate, however, that defendant was arrested at 10:00 p.m. and was put in a holding cell until 5:30 a.m. the following morning. Therefore, even if defendant was intoxicated and under the influence of drugs at the time of his arrest, the 7-1/2 hours in the holding cell provided defendant time to sleep and become sober. The trial court reviewed the circumstances, especially relying on the videotapes, and decided that the statements should not be suppressed. Defendant had great recall of the events surrounding the making of his statements, including the layout of the police station. Defendant recalled details from that time frame. For example, he identified the type of cellular telephone that a female officer used in the booking area. Defendant's actions at the time of giving his statements, along with his recollection of details, support the conclusion that he was not intoxicated and could knowingly and intelligently waive his rights. A finding of fact is only clearly erroneous if it leaves us with a definite and firm conviction that a mistake has been made. *People v Kvam*, 160 Mich App 189, 196; 408 NW2d 71 (1987). There is no evidence that a clear error was made by the trial court in determining that defendant was not intoxicated; thus, we

must determine that the trial court did not err in determining that defendant's statements were the product of a voluntary, knowing and intelligent waiver.

Defendant next contends on appeal that the trial court abused its discretion by denying his motion to be referred to the forensic center for a determination of competency. The determination of a defendant's competence is within the trial court's discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). A defendant is presumed competent to stand trial absent a showing that "he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." *Id.*, quoting MCL 330.2020(1). A defendant is entitled to a competency hearing if there is a bona fide issue as to his competency. See *Harris*, *supra* at 102. The trial court's decision as to the existence of a "bona fide doubt" will only be reversed where there is an abuse of discretion.² *Id.* A defendant is deemed competent to stand trial or submit a plea if he has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational, as well as factual, understanding of the proceedings against him. *People v Belanger*, 73 Mich App 438, 447; 252 NW2d 472 (1977).

Defendant expressed a high level of understanding and a high level of competency in this case. He wrote many of his own motions. He also maintained a steady correspondence with the Court Administrator, trying to ensure that he was given a fair trial. He was concerned about the forensic evidence and articulated his belief that his attorneys were not advocating for him to the best of their abilities. Defendant on occasion made these concerns known to the judge in open court, despite his attorney's efforts to restrain him. These disagreements between attorney and defendant led defense counsel to file the motion for referral to the forensic center. Defendant, however, made it clear in court that he wanted to proceed with trial and that he was fully aware of the nature and object of the proceedings. Further, defendant had no history of mental illness, although we acknowledge that defendant had a substance abuse problem. The trial court observed defendant throughout the process, up to the point of the motion, and indicated that there was no indication or evidence to suggest that defendant was incompetent to stand trial. For these reasons, we find that the trial court did not abuse its discretion when it denied defendant's motion for a competency evaluation.

Defendant finally argues on appeal that his attorney's failure to utilize a private investigator and a forensic evidence expert, coupled with not having sufficient time to prepare for trial, violated his rights to effective assistance of counsel. In making his arguments, defendant offers no explanation or rationale for any of the claims asserted. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of

² The abuse of discretion standard recognizes "that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

supporting authority.” *People v Kelly*, 231 Mich App 627, 645; 588 NW2d 480 (1998). However, we note that we actually reviewed defendant’s allegations and found that they are either unsupported by the record or defendant has failed to demonstrate that, but for the errors, he would have been acquitted.

A determination regarding whether a defendant was deprived of the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court must first determine the facts and then decide whether these facts constitute a violation of defendant’s right to effective assistance of counsel. *Id.* Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.* Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, the attorney’s performance must have been “objectively unreasonable in light of prevailing professional norms” and “but for the attorney’s error or errors, a different outcome reasonably would have resulted.” *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). Because defendant failed to meet his burden of proving the existence of errors that were objectively unreasonable and that, but for the alleged errors, the trial result would have been different, we reject defendant’s claim that he did not receive effective assistance of counsel.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello